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No. 92-513

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In The

Supreme Court of the United States

October Term, 1992

RALPH BAGGS, VERN BAGGS, JR., GARY A. DELECKI, LORI J. GLICK, MERRILL J. HANSEN, TRACY HELSEL, ROBERT KANAZIZ, ANTHONY F. KROL, PENNY J. PAHL, GARY PARKER, GARY ROESSLER, MARK RUSSELL, DAVID WILSON, MARY ANN FENDER, WALTER MONTNEY, PATRICIA RUSSELL, DANIEL SCHELSKE, NADINE WELLS, JAMES D. WILSON II, JAMES MacDONALD,

Plaintiffs-Petitioners,

THOMAS A. BROWN, BILL ELYA III, GARRY MOORE, TIMOTHY MORRISON, DEANE W. PAHL,

Plaintiffs,

v.

EAGLE-PICHER INDUSTRIES, INC., an Ohio Corporation,

Defendant-Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JON G. MARCH (P17065)
Counsel of Record
JENNIFER DELESSIO (P41978)
MILLER, JOHNSON, SNELL & CUMMISKEY
800 Calder Plaza Building
Grand Rapids, MI 49503
(616) 459-8311

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QUESTIONS PRESENTED

I. Whether this Court should exercise its discretion to review the dismissal of plaintiffs-petitioners' state law claims where the lower court's decision does not conflict with the decisions of other circuit courts or Michigan law?

II. Whether this Court should exercise its discretion to review the dismissal of plaintiffs-petitioners' state law claims where the issues in this case are not sufficiently important to warrant this Court's attention because there is absolutely no federal question involved, let alone a substantial one?

III. Whether this Court should exercise its discretion to review the dismissal of plaintiffs-petitioners' state law claims where the lower courts gave full consideration to the issues and decided them correctly and fairly in accord with state law?

RULE 29.1 STATEMENT

Pursuant to S.Ct. Rule 29.1, Eagle-Picher Industries, Inc. discloses that it has no parent company but has the following non-wholly owned subsidiaries:

American Imaging Services, Inc.
Diehl & Eagle-Picher GmbH
Tri-Sigma Corporation

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The opinion of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States District Court for the Western District of Michigan is reported at 957 F.2d 268 (6th Cir. 1992). The opinion of the United States District Court for the Western District of Michigan is reported at 750 F. Supp. 264 (W.D. Mich. 1991).

STATEMENT OF THE CASE

I. Introduction

The plaintiffs-petitioners seek a judicially created limitation on the extent to which a private employer may attempt to deal with a major problem of employee drug use by utilizing a plant-wide drug screen urine test. The petitioners are former employees of respondent Eagle-Picher Industries, Inc.'s Trim Division in Kalkaska, Michigan who either quit rather than submit to a drug test or were terminated because of a positive test result for illegal drugs.

The petitioners' complaint and amendments alleged the following claims: 1) breach of contract; 2) defamation; 3) invasion of privacy (common law and constitutional); 4) misrepresentation; 5) negligence; and 6) Michigan's Handicapper's Civil Rights Act.

Honorable Robert Holmes Bell of the United States District Court for the Western District of Michigan granted summary judgment under Fed. R. Civ. P. 56 in

favor of respondent on all of petitioners' claims. Petitioners appealed the trial court's decision with respect to Count I (breach of contract), Count II (defamation) and Count III (common law invasion of privacy) of their Third Amended Complaint. Petitioners did not appeal the dismissal of their other claims. The Sixth Circuit Court of Appeals properly affirmed the trial court's decision.

II. Counter-Statement of Facts

Petitioners were obligated to demonstrate to the trial court by affidavits, depositions, interrogatory answers, or admissions that there was a genuine issue of material fact for trial. *Vollrath v. Georgia-Pacific Corp.*, 899 F.2d 533, 535 (6th Cir. 1990), *cert. den.*, ___ U.S. ___, 111 S.Ct. 345 (1990). Petitioners have done nothing more than make an argumentative and unsupported statement of facts. Many of petitioners' so-called "facts" are simply wrong and none were supported by record evidence before the lower courts as required by law.

Eagle-Picher's Trim Division. Respondent Eagle-Picher Industries, Inc.'s Trim Division makes parts such as headliners and door panels for the automotive industry. In order to remain viable in this extremely competitive industry, Eagle-Picher's Trim Division must constantly increase its efficiency and productivity. The assembly process at the Trim Division uses teams of workers to produce finished parts. If a team member is inefficient or unable to perform, it adversely affects the

ability of the entire team to reach production goals and meet quality standards. (Aslanian Aff, ¶ 4)[1]

The manufacturing process at the Trim Division utilizes numerous machines which are potentially hazardous and could severely injure employees if misused. Injuries to workers have resulted from these operations. (Aslanian Aff, ¶ 3)

In August of 1989, the approximately 230 Trim Division employees were non-union and employed on an at-will basis. Each of the petitioners signed an employment application which contains language indicating employment-at-will. (Aslanian Aff, ¶¶ 2 and 23) Employment-at-will language is also set forth in the company's employee handbook.

The Drug Problem. Beginning in late 1988 and continuing into 1989, company management became aware of a growing problem of illegal employee drug use at the Trim Division plant. Many employees were making complaints and comments to management officials about the drug use by other employees while at work. Company management also heard from truck drivers making deliveries to the plant and from a building contractor working at the plant that many employees were using drugs. One of the supervisors overheard a CB radio conversation between truck drivers in which the plant was referred to as a "drug house". (Aslanian Aff, ¶ 5)

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[1] These references are to the affidavit of Trim Division President Michael Aslanian. Petitioners' deposition testimony will be referenced by the deponent's name and the transcript page where the testimony occurred.

In response to these complaints concerning drug use, a drug free workplace policy was posted in April, 1989. That policy prohibited employees from possessing, using or being under the influence of drugs while at work, and also provided that under certain circumstances employees could be drug tested. In addition, all employee applicants were required to take drug tests as a prerequisite to hiring. (Aslanian Aff, ¶ 7)

When the employee complaints about drug use persisted, Division President, Michael Aslanian, consulted with the Kalkaska County Sheriff and with representatives of the Grand Traverse Narcotics Team. Consequently, an undercover agent was placed in the plant as an employee from mid-April until early June, 1989. Two Trim Division employees were arrested at work for selling drugs as a result of that undercover operation. Those employees were immediately discharged. (Aslanian Aff, ¶ 8)

The undercover agent estimated after he had finished his operation that as many as 60% of the company's workforce used drugs at home or at work or both. In addition, he gave Mr. Aslanian reason to believe that some of the plant's supervisors were also involved in drugs. (Aslanian Aff, ¶ 8) Many of the petitioners have admitted that there was widespread drug use. (Cummer Dep, 28-29; Krol Dep, 37; Montney Dep, 32; Hansen Dep, 14, 42-43)

With confirmation from the undercover agent that a problem existed and that it was more widespread than originally believed, Mr. Aslanian met in late June, 1989 with his superiors to determine what action to take.

(Aslanian Aff, ¶ 9) At that meeting, it was decided to institute drug testing of all Trim Division employees. Company officials considered and rejected using random drug testing, because they felt it was less fair than testing all employees and, given the extent of the problem, it would be an ineffective deterrent. Company officials also considered testing employees only if there was some individualized suspicion of drug use, but although employees complained about the drug problem, they were reluctant to "rat on" other employees. The company's concern about the ineffectiveness of using drug tests on only a selective basis was heightened by the belief that some supervisors were either themselves using drugs or were failing to vigorously support the company's drug policy. Therefore, company management felt that the fairest and most effective way of combating the problem was to use plant-wide testing of all employees. (Aslanian Aff, ¶ 9)

In preparation for the testing, the company's drug free workplace policy was revised to clarify that coming to work with illegal drugs in an employee's system was a dischargeable offense. This revision strengthened the earlier provision that prohibited an employee from working under the influence of drugs in order to avoid any argument about whether an employee was or was not "under the influence" of drugs. The policy was also revised to indicate that submitting to a drug test at the request of company management was a condition of continued employment. (Aslanian Aff, ¶ 10)

The policy also contained the provision that was found in the earlier policy that any employee who believed that he or she had a drug problem could come to

company management and request and receive help. Both policies made it clear, however, that in order to qualify for help, the employee had to come forward on his or her own initiative before the company received information that the employee had violated the company's drug policy.

The revised drug policy was posted on the employee bulletin board on July 17, 1989. (Aslanian Aff, ¶ 10; Paul Dep, 22; Montney Dep, 20) A second posting was placed on another bulletin board which was used for personal employee messages, and that posting urged the employees to review the new drug policy. Supervisors were also instructed to inform employees of the new drug policy and urge them to read it. (Aslanian Aff, ¶ 10) The revised drug policy was also included in the employee handbook which was distributed on August 7 and 8, 1989. (Third Amended Complaint, Ex. A, p. 35)

The Drug Testing. The drug testing was scheduled to begin at the start of the second shift on August 10, 1989 and continue with the third and first shifts on August 11th. At the beginning of the second shift on August 10th, Mr. Aslanian called a meeting of all the employees and notified them that because of the extent of the drug problem, and because it was his intention to provide a drug free workplace in order to protect the safety and jobs of all employees, every employee in the plant would be required to submit to drug testing that afternoon. He indicated that if any employee did not wish to submit to drug testing, that employee simply had to leave the plant and he or she would be considered to have voluntarily resigned. All employees who remained, however, would be required to take the test, and any employee testing

positive for illegal drugs would be terminated. Some employees did choose to leave the plant. All the employees who remained were tested. (Aslanian Aff, ¶ 11)

The testing was conducted under the supervision of a professional testing organization, Drug Services Intervention Administration. Each employee signed a consent form before being tested. The samples were collected in the plant lavatories with a nurse (male or female as appropriate) present to assure that the samples were not contaminated or otherwise tampered with, but the nurses did not directly observe the void. (Aslanian Aff, ¶ 12)[2]

After a sample was collected, it was sealed and the employee initialled a chain of custody form. The samples were then sent by Air Express to SmithKline Bio-Science Laboratories, where they were tested at pre-set threshold levels for the presence of specified illegal drugs. Each positive test was confirmed by gas chromatograph mass spectrometry (GC/MS). The combined accuracy of the preliminary test and the GC/MS was 100%. If a sample did not show the presence of drugs at or above the pre-set level, the test was reported as a negative result.[3] (Aslanian Aff, ¶ 13; Affidavit of Leland McClure, Ph.D., Director of SmithKline Laboratory, ¶¶ 4-5)

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[2] Those employees who were absent on August 10th or 11th were tested later at a Kalkaska area health clinic, again under the supervision of trained medical personnel.

[3] Marijuana was tested at a level of 50 nano-grams per milliliter, which is the same testing level utilized by the National Football League, and which rules out ingestion of marijuana through passive inhalation.

The test results were returned to the Trim Division by SmithKline Laboratories on August 16, 1989. Mr. Aslanian talked to each employee who had tested positive for an illegal drug and informed them of their discharge. Mr. Aslanian also told each discharged employee that if they completed a drug rehabilitation program, they would be eligible for rehire. (Aslanian Aff, ¶ 14)

Petitioners' Admitted Drug Use. All but one of the petitioners who were discharged because of a positive drug test result and have been deposed have admitted using an illegal drug during the period of time prior to the drug testing and do not contest the accuracy of the drug test. Of the petitioners who quit rather than take the test and have been deposed, only two have denied any drug use whatsoever. The other petitioners in this category have admitted to at least some illegal drug use.

Media Inquiry. The drug problem at the Eagle-Picher Trim Division and the resulting drug testing and discharges came to the attention of the Traverse City area news media, and the company was besieged with media inquiries. It is undisputed that no one from company management contacted the media to inform them of the drug testing. (Aslanian Aff, ¶ 20) To the contrary, one of the petitioners, Anthony Krol, testified at his deposition that he told a reporter for the Traverse City Record-Eagle what had occurred, that some people had been terminated for testing positive, and that others quit rather than take the drug test. Mr. Krol did not tell the reporter about the drug usage which Mr. Krol had observed at the plant. (Krol Dep, 52-53) Mr. Krol also talked to a reporter from the Detroit News about the same subjects. (Krol Dep, 56-57)

Due to no action of his own, Mr. Aslanian was nevertheless confronted by media representatives asking for comments. Mr. Aslanian was concerned that if he said nothing, the company might be portrayed unfairly and inaccurately as a company that had a continuing drug problem, and there would be a sense that employee morale at the Trim Division facility was very low because of the drug testing. Mr. Aslanian feared these impressions could hurt the company's position with its customers, suppliers and potential employees. (Aslanian Aff, ¶ 21) Accordingly, Mr. Aslanian responded to the media, explained the concern which had given rise to the drug testing, discussed in general terms the testing process and results, and stated his belief that the majority of the employees accepted the drug testing and that employee morale was high. Mr. Aslanian never mentioned any employee by name. (Aslanian Aff, ¶ 21)

REASONS FOR DENYING THE WRIT

Petitioners claim that this Court should grant certiorari to review the decision of the Sixth Circuit because: (1) the opinion below conflicts with a decision of the Third Circuit and somehow alters Michigan law; and (2) this case involves issues of national importance. Petitioners' arguments fail and this Court should not exercise its extraordinary and discretionary jurisdiction for the reasons discussed below.

I. THE THIRD CIRCUIT DECISION CITED BY PETITIONERS DOES NOT CONFLICT WITH THE SIXTH CIRCUIT'S DECISION IN THIS CASE AND IT IS PRESENTLY ON REMAND TO THE TRIAL COURT SO IT IS NOT RIPE FOR CONSIDERATION BY THIS COURT.

Petitioners argue that the Sixth Circuit's decision in this case conflicts with the decision of the Third Circuit in *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611 (3rd Cir. 1992). Nothing could be further from the truth. Not only is *Borse* factually distinguishable from this case, it involves a claim of wrongful discharge in violation of public policy, a claim which was not pleaded by the petitioners in their three amended complaints nor raised or decided in the courts below.

In *Borse*, the Third Circuit held that, *under certain circumstances*, the discharge of a private-sector at-will employee who refuses to take a drug test may be in violation of the public policy embodied in Pennsylvania cases recognizing the tort of invasion of privacy.

The Third Circuit envisioned two ways in which an employer's urinalysis program might violate Pennsylvania public policy: (1) if test monitors directly observe urination during the specimen collection; and (2) if private medical facts about the employee are disclosed as a result of the drug test (i.e., pregnancy, diabetes, etc.).

Because the plaintiff in *Borse* did not sufficiently allege facts to support such a claim, the Third Circuit remanded the case to the trial court so the plaintiff could amend her complaint. The Third Circuit directed the trial court to examine the circumstances surrounding the

alleged wrongful discharge to determine whether the employer's particular urinalysis program involved a highly offensive intrusion into the employee's privacy.

A. Borse Is Legally Distinguishable From This Case Because Michigan Courts Do Not Recognize A Cause Of Action For Wrongful Discharge In Violation Of Public Policy Based On Judicial Opinion.

Borse is legally distinguishable from this case for several reasons. First, although Michigan courts recognize that employers cannot discharge or otherwise discipline at-will employees for reasons that will contravene settled public policy, such an action can be based on one of three grounds:

> (1) "explicit *legislative statements* prohibiting the discharge, discipline, or other adverse treatment of employees in accordance with the statutory right or duty";
>
> (2) "*legislative expression of policy*" from which a cause of action can be implied (i.e., when an employee is discharged for refusing to violate a law); and
>
> (3) an implied prohibition against retaliatory discharge, "when the reason for discharge was the employer's exercise of a right conferred by a *well-established legislative enactment*" (i.e., filing a workers' compensation claim).

Suchodolski v. Michigan Consolidated Gas Co., 412 Mich. 692, 695-696, 316 N.W.2d 710, 711-712 (1982) (per curiam) (emphasis added).

Petitioners simply argue that Michigan case law recognizing the common law tort of invasion of privacy

constitutes an expression of public policy. Petitioners' position is contrary to an unbroken line of authority in Michigan that an employee must identify a *specific legislative statement* upon which to base a claim for violation of public policy. *See Suchodolski, id.*; *Goins v. Ford Motor Co.*, 131 Mich. App. 185, 347 N.W.2d 184 (1983), *lv. to app. den.*, 424 Mich. 879 (1986); *Hrab v. Hayes-Albion Corp.*, 103 Mich. App. 90, 302 N.W.2d 606 (1981). There is no legislative enactment or legislative policy statement prohibiting drug testing in Michigan, and petitioners cite none. Nothing shown by petitioners warrants this Court's reexamination of this settled state law principle, particularly when petitioners did not even assert a discharge in violation of public policy claim.

Even the *Borse* court noted that courts in several jurisdictions have held that urinalysis programs conducted by private employers do *not* violate the public policy exception to the employment-at-will doctrine in the absence of public policy *expressed by the legislature.* Pennsylvania courts, on the other hand, recognize judicial opinion alone as competent evidence of public policy. 963 F.2d at 620. Therefore, because *Borse* is not based on statutory public policy or a legislative statement, it would not be precedent for Michigan courts, and it is not in conflict with or even applicable to this case.

The Third Circuit went a step further and distinguished the Sixth Circuit's decision in *this particular case by name* from its holding in *Borse. See* 963 F.2d at 622, n. 11. The Third Circuit noted that Michigan law permits an employer to use "intrusive and even objectionable means to obtain employment-related information about an employee." In contrast, Pennsylvania courts apply the

same standards to non-employment and employment related invasion of privacy actions. *Id.* Once again, Michigan law departs significantly from that of Pennsylvania, and *Borse* is legally distinguishable from this case.

This Court has held that as to questions of state law, a perceived conflict among the circuits is not a reason for granting certiorari. The "conflict" may be, as it is here, merely corollary to a permissible difference of opinion among state courts. *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206, ___ S.Ct. ___ (1937).

B. Borse Is Factually Distinguishable From This Case.

Even if *Borse* were precedent for this case, it is factually distinguishable. The *Borse* court noted that there was no suggestion in the record of how the employer's urinalysis program was conducted. 963 F.2d at 626. Therefore, the trial court and the Third Circuit were without certain facts they needed to determine whether the drug testing program constituted a highly offensive intrusion upon the plaintiff's privacy.

In this case, however, the record below is very detailed as to the growing employee drug problem at the Trim Division and the safety and production reasons for implementing the Eagle-Picher urinalysis program. The record is also replete with the reasonableness of the circumstances surrounding Eagle-Picher's urine collection procedure. Given the facts in this case, the two scenarios outlined by the Third Circuit which might support a finding of invasion of privacy in Pennsylvania are simply not present here. First, the actual void was not observed

during the Eagle-Picher drug testing program. (Aslanian Aff, ¶ 12) Second, the drug tests were aimed at detecting *only* the presence of certain illegal drugs as opposed to other medical information. (Aslanian Aff, ¶ 13) The *Borse* court stated that under these circumstances, a reasonable person would likely *not* find the program highly offensive so as to amount to an actionable invasion of privacy. 963 F.2d at 624. Therefore, even if *Borse* were precedent for this case (which it is not), it is factually distinguishable and not in conflict with the decision of the Sixth Circuit.

C. Petitioners' Argument Regarding Wrongful Discharge In Violation Of Public Policy Is Not Properly Before This Court.

Petitioners have never raised a claim of wrongful discharge in violation of public policy in any of their three amended complaints or in their briefs to the lower courts. Other than citing *Borse* as conflicting with the Sixth Circuit decision in this case, petitioners still have not raised wrongful discharge in violation of public policy as a claim to be reviewed in its argument to this Court. Therefore, the public policy exception to the employment-at-will doctrine as discussed in *Borse* is not properly before this Court.

Even if petitioners properly raised the public policy exception to the employment-at-will doctrine, the *Borse* case has been remanded to the trial court for further proceedings. The public policy analysis which petitioners claim conflicts with the Sixth Circuit decision in this case has not been satisfactorily defined or resolved by the

Pennsylvania courts. Therefore, this perceived conflict is not even ripe for consideration by this Court.

This Court should only be burdened with *actual* conflicts among the circuits which impair uniformity of decision where uniformity is significant. Here, the only perceived conflict of opinion among the circuits is due to the particular law of each state and particular facts of each case. Therefore, a writ of certiorari should not issue to review the decision below.

II. THE ISSUES IN THIS CASE ARE NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S ATTENTION BECAUSE THERE IS NO SUBSTANTIAL FEDERAL QUESTION.

The issues in this case involve only issues of Michigan common law and are too narrow to warrant review by this Court on certiorari. This case does not in any sense concern constitutional privacy rights because there is no state action. It does not involve any issue of federal law. It involves only principles of Michigan contract, defamation and invasion of privacy law which are well established and have been long-settled by Michigan courts.

The only real arguments petitioners raise turn on the undisputed unique facts of this case as applied in the context of state law principles. In essence, petitioners ask this Court to make a third review of the record to see if it can find what two previous courts have been utterly unable to find – an unlawful intrusion into petitioners' seclusion, breach of an alleged employment contract, and defamation. This Court has held that such fact canvassing

is not a task to be served by a grant of certiorari: "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227, ___ S.Ct. ___ (1925).

Petitioners cannot reasonably expect this Court to ensure that every case in a federal court is decided as every other federal or state court would have decided it. Instead, this Court should confine its interposition to cases in which a federal circuit court has announced a rule, potentially governing a substantial number of other cases, in direct conflict with a rule announced by an authoritative state court decision. That has not occurred in this case. As shown below, the lower courts' decisions are fully supported by and consistent with established state law. Certiorari should therefore be denied.

III. THE TRIAL COURT AND SIXTH CIRCUIT GAVE FULL CONSIDERATION TO THE ISSUES AND DECIDED THEM FAIRLY AND CORRECTLY.

The trial court's and the Sixth Circuit's opinions below were accurate, fair, and fully in accord with cases in Michigan as well as other jurisdictions. Petitioners have made a conclusory argument that the Sixth Circuit holding "detrimentally alters Michigan law" but they have cited no cases or legal theories to support this proposition. (Petitioners' Brief at 12, 37) The lower courts' decisions are based on well-established doctrines with regard to the state law issues of breach of contract, defamation and invasion of privacy, and petitioners' claims were properly dismissed. Any result other than the one

reached by the courts below would have been directly contrary to Michigan law.

A. Petitioners' Breach Of Contract Claim Was Properly Dismissed By The Lower Courts.

1. Respondent Did Not, As A Matter Of Law, Breach Any Contract With Petitioners By Not Utilizing Progressive Discipline In Connection With The Employee Drug Testing.

Petitioners argue that respondent's Hourly Employee Handbook created a contract right to progressive discipline and to be discharged only for cause under *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W.2d 880 (1980). The trial court and the Sixth Circuit properly found that petitioners' claim failed as a matter of law for the following reasons:

(1) The provisions of the revised employee handbook clearly indicate that the company was not obligated to utilize the four-step warning system before discharging violators of the company's drug free workplace policy. *See, e.g., Loftis v. G. T. Products, Inc.*, 167 Mich. App. 787, 423 N.W.2d 358 (1988), *lv. app. den.*, 431 Mich. 897 (1988). Both the company's written drug policy and consistent past practice conclusively established that drug related misconduct was a serious offense which would result in immediate discharge.

(2) Unlike the handbooks at issue in *Toussaint*, the Eagle-Picher handbook never stated that employees would be discharged only for cause or only for violation of the listed rules. To the contrary, the handbook as well

as petitioners' employment applications indicated that petitioners were employees-at-will who could be terminated at any time without notice and without cause. When faced with an identical claim based on a list of rules distributed to employees, the Michigan Supreme Court refused to find a just cause employment contract. *See Rowe v. Montgomery Ward & Co.*, 437 Mich. 438, 473 N.W.2d 268, 275 (1991). *Accord Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986).

(3) Even if the Eagle-Picher handbook had created a just cause contract, petitioners were discharged for cause for violating the drug policy. *See, e.g., Obey v. McFadden Corp.*, 138 Mich. App. 767, 360 N.W.2d 292 (1984).

2. Respondent Gave Reasonable Notice To Petitioners Of All Handbook And Policy Revisions.

Petitioners argue that the August, 1989 Eagle-Picher Handbook and its Drug Free Workplace Policy do not define the terms of petitioners' employment because employees were not given reasonable notice of the handbook revisions. (Petitioners' Brief at 29-30) However, the Michigan Supreme Court recently held that an employer can unilaterally change a work policy provided the employer gives affected employees reasonable notice of the amendment. *In Re Certified Question*, 432 Mich. 438, 441, 443 N.W 2d 112 (1989). Reasonable notice does not require *actual* notification. *Grow v. General Products, Inc.*, 184 Mich. App. 379, 386, 457 N.W.2d 167 (1990).

In this case, the Sixth Circuit properly held that the notification method was adequate because Eagle-Picher

clearly posted the new drug policy in several logical and highly visible locations around the plant a month before the drug test. Supervisors further publicized the new policy verbally and it was included in an employee handbook distributed to employees in early August, 1989.

B. Petitioners' Defamation Claim Was Properly Dismissed By The Lower Courts.

1. Respondent's Statements To The Media Were Privileged.

Petitioners argue that Eagle-Picher's President, Michael Aslanian, defamed petitioners in communications to the news media regarding the drug testing. Michigan law recognizes the existence of a qualified privilege to a claim of defamation where the speaker has an interest in the matter being discussed, communicates with a person having a corresponding interest, and acts in good faith. *Swenson-Davis v. Martel*, 135 Mich. App. 632, 636, 354 N.W.2d 288 (1984).

The trial court properly applied this qualified privilege to the actions of respondent Eagle-Picher in this case. Respondent did not seek out media attention concerning its drug problem, the drug testing, and the resulting terminations. Rather, media inquiry was instigated by one of the petitioners. Nearly all of the petitioners have admitted that the Eagle-Picher drug situation was a matter of media notoriety and legal concern. Respondent therefore had an interest in protecting its reputation with its customers, suppliers and potential future employees, by discussing the nature of the problem, the measures

respondent had taken to deal with it, and the positive reaction of the remaining employees.

In order to overcome the qualified privilege, petitioners must plead and offer some proof of actual malice. *Bostetter v. Kirsch Co.*, 319 Mich. 547, 559, 30 N.W.2d 276 (1948). Petitioners failed to allege malice in any of their amended complaints, and they offered no evidence of actual malice by Mr. Aslanian.

Petitioners seek to avoid their lack of evidence of malice by asserting that the Michigan Supreme Court in *Rouch v. Enquirer & News of Battle Creek*, 427 Mich. 157, 398 N.W.2d 245 (1986), *reh. den.*, 428 Mich. 1207 (1987), *later app.*, 184 Mich. App. 19, 457 N.W.2d 74 (1990), *app. granted*, 437 Mich. 1035, 472 N.W.2d 637, *vacated on other grounds*, 440 Mich. 238, 487 N.W.2d 205 (1992), *reh. den.*, 440 Mich. 1209, ___ N.W.2d ___ (1992), replaced the malice requirement with a negligence standard. Petitioners are wrong. In *Rouch*, the Michigan Supreme Court held only that the "qualified public-interest privilege" is inapplicable to protect a media respondent from the claim of a non-public plaintiff on the ground that privilege has been subsumed by constitutional standards. 427 Mich. at 187. The court was very careful to note that its decision had "no effect on other recognized common-law privileges in Michigan." 427 Mich. at 180 n. 13, 200 n. 24. The duty/interest privilege set forth in the *Bostetter* case remains viable and is applicable here.

2. Respondent Did Not Make The Statements Alleged, And The Only Statement Which Might Be Implied Is True As To Most Petitioners.

Petitioners claim that Eagle-Picher defamed them by implying that petitioners must be drug users for refusing to take the mandated test and stating that petitioners were impaired in the performance of their jobs. (Petitioners' Brief at 59)

There is no evidence that Mr. Aslanian or anyone on behalf of respondent ever indicated to the media that any of the petitioners "were impaired in the performance of their jobs" or were drug users. In fact, he never mentioned any employee by name. Petitioners contend, however, that by stating that some unnamed employees failed a drug test and that other unnamed employees refused to take the drug test, Mr. Aslanian implied that everyone in both categories was a drug user. The Sixth Circuit properly held that such an implication cannot be reasonably drawn from respondent's statements and will not support a claim of defamation. *See Baggs v. Eagle-Picher Industries, Inc.*, 957 F.2d 268, 273 (6th Cir. 1992).

Furthermore, in the case of nearly all of the plaintiffs, respondent is protected by the defense of truth. *Bostetter v. Kirsch Co.*, 319 Mich. 547, 559, 30 N.W.2d 276 (1948). All but three of the petitioners admitted that they have used illegal drugs during the period of time they were employed by Eagle-Picher. A person who has admitted using an illegal drug can hardly claim defamation for being labeled a "drug user". Accordingly, separate and apart from the defense of privilege, the lower courts

properly found that petitioners' defamation claim failed as a matter of law.

C. The Trial Court And Sixth Circuit Properly Dismissed Petitioners' Claim That The Drug Testing Violated Petitioners' Expectation Of Privacy.

Petitioners argue that the means and implementation of the company's drug test was an unwarranted intrusion into their seclusion under Michigan common law.[4] The elements of that claim have been held to be the following:

(1) an intrusion by defendant;

(2) into a matter which plaintiff has a right to keep private;

(3) by the use of a method which is objectionable to the reasonable person.

Lewis v. Dayton-Hudson Corp., 339 N.W.2d 857 (Mich. App. 1983) (citing *Earp v. Detroit*, 16 Mich. App. 271, 276-277, 167 N.W.2d 841 (1969)).

Applying those elements to the facts of this case, the lower courts properly found that petitioners' privacy claim failed as a matter of law for the following reasons:

(1) There was no intrusion into a matter which the petitioners had a right to keep private. Under Michigan law, an employee's right to privacy may be outweighed by a legitimate business interest. *Saldana v. Kelsey-Hayes*

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[4] Those petitioners who declined to take the test have no claim for invasion of privacy. *See Gretencord v. Ford Motor Co.*, 538 F. Supp. 331 (D. Kan. 1982).

Co., 178 Mich. App. 230, 443 N.W.2d 382 (1989), *lv. app. den.*, 435 Mich. 857 (1990). Petitioners' interest in engaging in illegal drug activity certainly did not outweigh respondent's legitimate interest in running a safe, efficient and productive business which provides job opportunities for its employees.

(2) The method of conducting the drug test in this case was not offensive to a reasonable person. Of approximately 230 people tested, well over 200, including many of the petitioners, have never made any objection to the collection process. The testing was carried out under controlled conditions reasonably designed to assure privacy and accuracy. The collection process was handled by nurses. The void itself was unobserved. All females used toilet stalls, and any male employee would have been allowed to do so upon request. No one made such a request. All positive tests were confirmed by GC/MS for 100% accuracy. The number of people present in the men's lavatory during the testing process was less than the number ordinarily present during break time. (Aslanian Aff, ¶ 12) In summary, the collection process was no more offensive than the normal use of a public restroom.

Petitioners do not dispute any of these facts. Instead, they rely on comments by some of the people involved in monitoring the test and handling the paperwork who complained about the working conditions, long hours, and pressure to speed up the testing process. These comments are totally immaterial to the issue of privacy. No petitioner has contended that his or her privacy was invaded by being rushed. No petitioner has claimed that the test results were inaccurate.

The only Michigan case, state or federal, of which respondent is aware concerning a claim of invasion of privacy in the context of private employer drug testing is *DiTomaso v. Electronic Data Systems*, 3 I.E.R. Cases 1700 (E.D. Mich. 1988), which plaintiffs omit entirely from their brief. The plaintiffs in that case were four security guards who were discharged after urinalysis tests proved positive for use of marijuana. One of the plaintiffs' many claims in *DiTomaso* was that the drug testing constituted an invasion of privacy under Michigan common law. The plaintiffs contended that their off-duty illegal drug use is "by right a private matter unless or until defendant can show that it affects their work performance." The court disagreed and held that the right to be free from intrusion is not absolute and does not extend so far as to subvert those rights which spring from business relations. The court concluded that defendant had a significant interest in assuring that its security officers were free of drug use prior to the formation of any specific suspicion.

The only Michigan case relied on by petitioners, *Harkey v. Abate*, 131 Mich. App. 177, 346 N.W.2d 74 (1983), is readily distinguishable from this one. There, the court held that surreptitious observation panels in the ceiling of a public restroom allowing defendant to observe the petitioner and her daughter constituted an invasion of privacy. The installation of such panels is a felony under Michigan law, and the defendant made absolutely no effort to show any business reason for the see-through panels. In addition, the plaintiffs had no idea they were subject to observation. In this case, Eagle-Picher had a

legitimate business reason for the intrusion, and submission to drug testing, which is not unlawful, was a stated condition of petitioners' employment.

D. Courts Of Other Jurisdictions Have Rejected Invasion Of Privacy Claims In The Context Of Private Employer Drug Testing.

A growing number of courts in other jurisdictions have considered and rejected claims arising out of drug testing by private employers, including claims of common law invasion of privacy. *See Jennings v. Minco Technology Labs, Inc.*, 765 S.W.2d 497 (Tex. App. 1989); *Texas Employment Commission v. Hughes Drilling Fluids, Inc.*, 746 S.W.2d 796 (Tex. Civ. App. 1988), *writ of error den.*, 4 I.E.R. Cases 1824 (Tex. S.Ct. 1989). Petitioners make no effort to address these cases.

Instead, petitioners have cited numerous cases involving the Fourth Amendment as if this case involved a public employer. It does not. But, even in cases involving governmental action which is subject to the restraints of the Fourth Amendment, this Court has approved drug testing of railroad and Customs Service employees *without* individualized suspicion that a particular employee had a drug problem. *See Skinner v. Railway Labor Executives Ass'n.*, 489 U.S. 602, 109 S.Ct. 1402 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384 (1989). Although these cases are inapplicable to a private employer, they show that even where an employee's right to privacy is constitutionally protected, an employer may nevertheless have legitimate interests which outweigh the employee's privacy right and permit

a program of employee drug testing without individualized suspicion of drug use. The employer's right to engage in such a program is far greater where, as here, there is no constitutional protection.

What petitioners are asking this Court to do is to ignore established Michigan common law principles and in effect "legislate" out of existence drug free workplace policies and company-wide drug testing programs like those of Eagle-Picher by creating a federal common law more to petitioners' liking. This Court should decline that invitation, just as the lower courts have. Any decision to limit the otherwise legally permissible means by which a private employer may deal with an employee drug problem should only be made by Congress or the state legislature, and to date neither has done so, perhaps reflecting a recognition of the magnitude of the drug problem and the need for employer flexibility in combating it. Under established Michigan law and the undisputed record evidence, the lower courts properly found that petitioners have no claim for invasion of privacy.

CONCLUSION

For the reasons set forth above, petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JON G. MARCH (P17065)
Counsel of Record
JENNIFER DELESSIO (P41978)
MILLER, JOHNSON, SNELL
& CUMMISKEY
800 Calder Plaza Building
Grand Rapids, MI 49503
(616) 459-8311
Attorneys for Respondent
Eagle-Picher Industries, Inc.